



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**MISC. CAUSE NO. 470 OF 2016**

**EPCO BUILDERS.....APPLICANT**

**VERSUS**

**KENYA BUREAU OF STANDARDS..... RESPONDENT**

**RULING**

1. This is a Notice of Motion dated 13<sup>th</sup> October, 2016 which seeks the following Orders:-

***1. Spent***

**2. That the Award made and published by Anthony Fredrick Gross on 15/09/2016 in the Arbitration between EpcO Builders Ltd and Kenya Bureau of Standards be set aside.**

**3. That the dispute between the Applicant and the Respondent be heard afresh by an Arbitrator to be appointed by mutual agreement of the parties or failing agreement within 30 days from the date of the order of appointment, the Court to appoint a sole Arbitrator from a list of three Arbitrators to be furnished by the Chairperson of the Chartered Institute of Arbitrators to arbitrate the dispute between the parties.**

**4. That costs of this application be provided for.**

2. The events leading to the award that is sought to be impeached can be abridged. Desirous of constructing and completing some works at its Regional Laboratories and offices in Mombasa, Kenya Bureau of Standards (KEBS) invited tenders vide tender reference NO. KEBS/T086/2012/2013 of 7<sup>th</sup> March 2013. EPCO Builders ltd (EPCO) emerged as the winners of that tender but the works were never to set off as KEBS cancelled the agreement that had been reached to formalize the tender.

3. EPCO were aggrieved and treated the cancellation of the Contract as a breach and notified KEBS that a dispute had arisen. EPCO invoked clause 37.1 of the Conditions of the Contract and after an exchange of correspondence the parties settled on and appointed Mr. Antony F. Gross as the Arbitrator to the Dispute.

4. The Claimant filed a statement of Claim dated 6<sup>th</sup> October 2014 and subsequently the parties filed their respective documents. Of significance to this matter is that the Arbitrator was to consider and determine the dispute on a “documents only” basis.

5. The Arbitrator published his award on 15<sup>th</sup> September 2016. In the Motion before Court, EPCO asserts

that the award is in contravention of Public Policy as it overlooks Legislation and the Constitution. The award is criticized as being inconsistent with sound Contractual Principles and Business Sense. Further that it is overly unfair to EPCO since it has incurred astronomical losses as a result of the unlawful breach.

6. In the written submissions filed herein on 16<sup>th</sup> February 2017, and further submissions of 17<sup>th</sup> May 2017, EPCO elaborate its grievances. They can be conveniently be considered under 3 heads.

7. But I would first observe that from the Application and submissions, what has irked EPCO is the Tribunal's Award on loss of profit. This was one of six Heads of claim that had been submitted for the Arbitrator's determination.

8. After espousing the National values and principles set out in Article 10(1)(b) of the Constitution, EPCO submits that every person has the right to have any dispute that can be resolved by application of law decided in a fair and public hearing before a Court or Independent and Impartial Tribunal or Body. That fairness requires that any Arbitral Tribunal must base its decision only on evidence and arguments presented before it by the parties.

9. In the Award, the Arbitrator had held:-

**“Even though I am not persuaded by the computation by the Claimant as stated above, what it does tell me is a percentage of profit put forward at 21%. Is this usual in the trade? I don't think so. Trade usage indicates parameters of percentage profit on construction works of this magnitude as ranging between 2 ½% and 7%. This was a sizeable contract, I am therefore inclined to take a middle way of 5%. In those circumstances, I believe an arithmetical calculation of loss of profit is possible for reasons given above as from the date of expectation of being handed over the site under the terms of the contract ie.18<sup>th</sup> July, 2013 to the date of termination of the same on 12<sup>th</sup> August, 2013; say 3 weeks.**

**i. The contractual period was 64 weeks.**

**ii. The contractual sum was KES 1,324,399,601**

**iii. I award a compromise profit percentage of 5%**

**I now compute Loss of Profit as follows:**

**Kshs. 1,324,399,601 x 3 x 5 =Kshs 3,104,062**

**64 100**

10. It is submitted that the issue of the alleged Trade usage had not been addressed by the only expert witness called nor were the parties asked to address the Arbitrator on it. EPCO cited a Malaysia decision of the Matter of Ahmani SND BHD and Petronas Penapison (Melaba) SDH BHA Originating Summons No. 24C (Nb) 11/3/2015 for the proposition that,

**“While the Arbitral Tribunal does not have to consult the parties on its thinking process before finalizing its award, it must consult the parties where the argument by which it reaches its decision is one which does not reasonably flow from any of the already argued or submitted premises”.**

11. EPCO also cites Section 25(4) of The Arbitration Act(hereafter The Act) which reads:-

**“(4) All statements, documents or other information furnished to, or applications made to, the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidential document on which the arbitral tribunal may rely in making its decisions**

**shall be communicated to the parties”.**

12. It is argued that the above provisions obliges the Arbitral Tribunal to disclose the source of information relied upon in arriving at its decision.

13. KEBS does not see much in the Motion and submits that in so far as it is a challenge to the merit of the Arbitral Tribunal’s decision it does not meet the requirements of Section 35(2) of the Act.

14. In respect to the alleged breach of Section 25(4) of the Act, KEBS argues that no evidence was tendered by EPCO to indicate that the Arbitral Tribunal relied on any report or evidential document contrary to the provisions of that Section.

15. Supporting the Arbitrator’s invocation of Trade usage, KEBS cites Section 60(1) and a 60(1)(0) of The Evidence Act which empowers Courts to take judicial Notice of Trade usage. That in any event, Arbitral Tribunals, unlike Courts, are allowed to use their Personal knowledge of the facts involved in the adjudication. For this latter proposition the Court was referred to the decision in Weatherhall vs. Harrison (1976) 1 ALL ER 241.

16. As stated earlier the only head of claim that is controversial is the Arbitrator’s assessment of loss of profit. After observing, and in my view correctly, that loss of profit is in the realm of special damages and must therefore be proven from pleadings and evidence. The Arbitrator was not persuaded by computation by the Claimant. He stated,

**“Even though I am not persuaded by the computation by the Claimant as stated above, what it does tell me is a percentage of profit put forward at 21%. Is this usual in the trade? I don’t think so. Trade usage indicates parameters of percentage profit on construction works of this magnitude as ranging between 2 ½% and 7%. This was a sizeable contract, I am therefore inclined to take a middle way of 5%. In those circumstances, I believe an arithmetical calculation of loss of profit is possible for reasons given above as from the date of expectation of being handed over the site under the terms of the contract ie. 18<sup>th</sup> July, 2013 to the date of termination of the same on 12<sup>th</sup> August, 2013; say 3 weeks.**

**iv. The contractual period was 64 weeks.**

**v. The contractual sum was KES 1,324,399,601**

**vi. I award a compromise profit percentage of 5%**

**I now compute Loss of Profit as follows:**

**Kshs. 1,324,399,601 x 3 x 5 =Kshs 3,104,062**

**64 100**

17. The Arbitrator then applied the profit percentage of 50% to work out the loss of profit.

18. It is conceded, as common ground I would think, that the expert witness who was called did not give any evidence of the Trade usage. It is further accepted that neither of the parties herein made arguments in respect thereof. Again, the Arbitrator did not invite the parties herein to make arguments on Trade usage.

19. In view of the above concessions, does the Application meet the threshold for setting aside of the Arbitral award under section 35 of The Arbitration Act?

20. But perhaps before making that determination, this Court needs to consider whether the award defiles the provisions of Section 25 of The Act which reads:-

25.

(1) Subject to any agreement to the contrary by the hearing parties, the arbitral tribunal shall decide whether to hold oral hearing for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials furnished under [section 24](#).

(2) Unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold oral hearings at an appropriate stage of the proceedings, if so required by a party.

(3) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purpose of inspection of documents, goods or other property.

(4) All statements, documents or other information furnished to, or applications made to, the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidential document on which the arbitral tribunal may rely in making its decisions shall be communicated to the parties.

(5) At any hearing or meeting of the arbitral tribunal of which notice is required to be given under subsection (3), or in any proceedings conducted on the basis of documents or other materials, the parties may appear or act in person or may be represented by any other person of their choice.

21. In the award of loss of profit the Arbitrator unequivocally stated that he applied the Trade usage of the percentage profit on construction works of the size under dispute. What the Arbitrator did not do is to disclose the source of his information.

22. Now, a usage of Trade is a practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that will be observed with respect to a transaction (Web Legal Dictionary). Mr. Anthony F. Gross was chosen as an Arbitrator by the parties herein through a consensual process. It is expected that the parties would trust the Arbitrator to have sufficient competence and peculiar knowledge of nature of dispute entrusted to him for determination. Would it therefore be suppressing and unnatural that he should have knowledge of the Trade Usage that he applied? EPCO have not demonstrated or indeed argued that Trade usage he applied was erroneous or unjustified. In the absence of that, this Court is not prepared to hold that the Arbitrator breached Section 25(4) of The Act for failing to disclose the source of information which he would be reasonably and naturally be expected to hold as a competent Arbitrator in respect to the matters before him.

23. Section 35 of The Arbitration Act provides as follows:-

**(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).**

**(2) An arbitral award may be set aside by the High Court only if—**

**(a) the party making the application furnishes proof—**

**(i) that a party to the arbitration agreement was under some incapacity; or**

**(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or**

**(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or**

**(iv) the arbitral award deals with a dispute not contemplated by or not falling**

within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

(b) the High Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ii) the award is in conflict with the public policy of Kenya.

(3) An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making that application had received the arbitral award, or if a request had been made under [section 34](#) from the date on which that request had been disposed of by the arbitral award.

(4) The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

24. EPCO hinges its challenge on the notion of Public Policy. As to the scope of Public Policy, this Court accepts the proposition by Justice Ringera in the now often cited decision in Christ for All Nations v. Apollo Insurance co. Ltd Nairobi HCC No. 477 of 1999:-

**“I am persuaded by the logic of the Supreme Court of India and I take the view that although public policy is a most broad concept incapable of precise definition, or that, as the common law judges of yonder years used to say, it an unruly horse and when once you get astride of it you never know where it will carry you, an award could be set aside under Section 35(2) (b) (ii) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that it was either (a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice or morality. The first category is clear enough. In the second category I would without claiming to be exhaustive include the interests of national defence and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya. In the third category, I would, again without seeking to be exhaustive, include such considerations as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals.”**

25. The pith of EPCO’s case, as I understand it, is that Arbitrator took into account extrinsic evidence without giving the parties the opportunity of addressing him on such evidence. And by so doing he offended the provisions of Articles 10 and 50 of The Constitution and was therefore inconsistent with the Public Policy of Kenya.

26. Section 29 of The Arbitration Act provides for Rules applicable to the substance of an Arbitral

dispute. For purposes of the matter at hand Subsection (5) is instructive and reads,

“In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the particular contract and shall take into account the usages of the trade applicable to the particular transaction”.

27. In the face of these express provisions, EPCO does not begrudge the Arbitrator for taking into account the Trade usage but assails him for failing to afford the parties the opportunity of addressing him on the Trade usage.

28. Although Section 29(5) permits an Arbitrator to apply a Trade usage to a dispute, it does not prescribe the manner in which a Trade usage is to be received into evidence. A Trade usage may be proved by calling of witness whose evidence must be clear, convincing and consistent that the usage exists as a fact. However, where a particular usage has acquired sufficient general or local notoriety then its existence can be judicially noticed under the provisions of Section 60 of The Evidence Act (see Harilal & CO. & another vs. The Standard Bank Ltd (1967) EA 512). Section 60 1(a) of The Evidence Act reads:-

**(1) The courts shall take judicial notice of the following facts—**

**(a) all written laws, and all laws, rules and principles,**

**written or unwritten, having the force of law, whether**

**in force or having such force as aforesaid before, at or**

**after the commencement of this Act, in any part of**

**Kenya;**

29. As it is undisputed that no evidence was called to prove the Trade usage, it can be safely assumed that the Arbitrator received and accepted it as a fact under section 60 of The Evidence Act. If that is so, then EPCO finds itself in a difficulty because it is trite law that an Arbitrator is the Master of the facts (see for example Total Kenya Limited vs. Kenya Pipeline Company Limited (2014) eKLR.

30. Reading the award in its entirety, the Claimant had proposed that the loss of profit be worked out at 21% profit margin on the contractual sum pleaded. The Arbitrator rejected this proposal and found, that in accordance with Trade usage the profit margin on construction works of the magnitude was between 2 1/2% and 7%. He then chose to apply a middle way of 5%. What the Arbitrator did was to find as a fact that the Profit margin applicable was 5% and not 21%. Even if the Arbitrator was wrong (which has not been demonstrated), an impeachment on the correctness of that finding would be an impeachment of the merit of the decision which falls outside the purview of a Section 35 application.

31. There is undoubtedly great force in the submission by Counsel for EPCO that whilst an Arbitral Tribunal (I would add Courts of law) does not have to consult parties on its thinking process in reaching a decision, it must do so if it would reach a decision which does not reasonably flow from any of the arguments already presented to it (Re Ahmani (*Supra*). But this submission is not available to EPCO in this instance because it had already made arguments on the profit margin to be applied but the Arbitrator found it unacceptable and instead applied what he found to be the margin that accorded with the Trade usage of the Industry.

32. Indeed, as reiterated by Ringera J. in Christ for All Nations (supra), the broad concept of Public Policy is an unruly horse. EPCO's attempt to saddle on this unruly horse will have to abort. The Motion of 13<sup>th</sup> October 2016 is without merit and is hereby dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 18<sup>th</sup> day of  
October, 2017.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Njenga for Applicant

N/A for Respondent

Alex - Court clerk